Mailed 3/15/2000

IN THE MATTER OF:	*	
	*	
Donald Morrison	*	
Claimant	*	
	*	
against	*	Case No.: 1999-LHC-1825
	*	
Electric Boat Corporation	*	OWCP No.: 1-141050
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Director, Office of Workers' Compensation Programs, United States Department of Labor	*	
Party-in-Interest	*	

APPEARANCES:

Carolyn P. Kelly, Esq.
For the Claimant

Peter A. Schavone, Esq.
For the Director

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 17, 1999 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 18	Attorney Kelly's Letter filing her	12/17/99
CX 19	Fee Petition	12/17/99
RX 23	Employer's comments thereon	12/20/99

The record was closed on December 20, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On 6/16/97 Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on 3/31/99.

7. The applicable average weekly wage is $1,009.36. .

8. The Employer voluntarily and without an award has paid temporary total compensation from 6/17/97 through the present and continuing.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Donald Morrison (a/k/a Donald Mounts) ("Claimant" herein), Fifty-two (52) years of age, with a GED obtained while serving honorably in the United States Navy from 1965 to the end of 1974 and with an employment history of manual labor, began working on January 3, 1980 as an outside machinist at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As an outside machinist Claimant had duties of assembling, building, installing and repairing valves, pipes and other such components on the boats and he daily had to climb several levels of vertical ladders to reach his work site while carrying his tool bag weighing twenty-to-twenty-five pounds, plus the weight of the valves, some of which weigh as much as one hundred pounds. He often performed his assigned duties in awkward positions. Claimant has sustained a number of injuries to various bodily parts while working at the shipyard and the present injury before me occurred on June, 16, 1997 and that injury is best described by the August 12, 1997 report of Dr. Mario J. Sculco, Claimant's treating neurological surgeon, wherein the doctor states as follows (CX 4 at 1-2):

"This patient was in his usual state of health having suffered a herniated disc following an injury on April 8, 1991 and the patient underwent successful disc excision. He returned to his normal activities and was doing well until the 17th of June, 1997. At that time the patient was attempting to pick up a V-mount weighing approximately 10 pounds and while the patient was sitting off the edge of a platform he reached out to pass it to a fellow worker. He then felt severe pain in his back, was unable to bend. Since that time he has developed severe and intense numbness, discomfort in the left lower extremity with radiation into the lumbosacral area. Bending, coughing, sneezing, straining increase discomfort. All movements of the back cause pain. There has been intense feeling of pins and needles and numbness in the left sciatic distribution whereas anterolateral thigh radiation has been noted on the right side. Symptoms have responded incompletely to bed rest but they have not worsened. He has been unable to return to work because he has had difficulty in getting dressed, walking or bending for any period of time.

"He underwent a postoperative MRI which revealed no recurrent disc herniation. He has recently undergone an MRI in June which shows again no recurrent disc herniation but some bulging possibly on the left side at L5-S1 with postoperative scarring of a normal degree."

"IMPRESSION: No clear-cut evidence of recurring herniated disc with marked neurogenic component in the form of numbness and tingling in the left lower extremity.

“RECOMMENDATION: Edipdural corticosteroids, course of physical therapy, possible use of TENS Unit to relieve muscle spasm. Use of muscle relaxers, analeptics. This patient will be able to resume selected light duty work over the next 4 to 6 weeks provided that success is encountered with these measures. There does not at this time appear to be any imminent necessity for surgical intervention at this point,” according to Dr. Sculco.

Dr. Sculco continued to see Claimant as needed and the doctor kept Claimant out of work as disabled. (CX 4 at 4-8)

Claimant was examined on November 3, 1997 by Dr. Melville P. Roberts, also a neurological surgeon, and the doctor’s impression was “that Mr. Morrison’s current symptoms are related to a recurrent disc rupture at L5-S1 lateral to the foramen with compression of the left L5 root,” and “because of the chronicity and severity of Mr. Morrison’s symptoms, based on the entire clinical picture (the doctor) would advise prompt surgery at L5-S1 on the left extending well into the foramen with identification of the L5 root and the underlying disc rupture.” Dr. Roberts agreed that Claimant was totally disabled and that the “current disc rupture is directly related to the twisting and lifting incident that occurred on 6/16/97" and he “advised Mr. Morrison to return to Dr. Sculco to be scheduled promptly for surgery.” (CX 5)

Claimant’s November 4, 1997 myelogram showed a disc herniation at the L5-S1 level on the left and his November 6, 1997 CT scan of the lumbar spine showed spondlyosis with multi-level disc bulging and a left-sided disc herniation at the L5-S1 level. (CX 6).

The low back pain continued and Claimant was hospitalized on January 20, 1998 to “undergo re-exploration of L4-5 and L5-S1 and removal of new and recurrent disc if present and foraminotomy is indicated.” (CX 7) The surgery took place and Dr. Sculco actually performed a laminectomy at L4-5, a facetectomy neurolysis at L4-5, L5-S1, as well as excision of herniated disc at L4-5 and L5-S1, and a radical facetectomy at L5-S1. Claimant was discharged on 1/24/98. (CX 7-4) On 3/10/98 Dr. Sculco prescribed a membership in the YMCA for an aquatic therapy program to alleviate the lumbar spine symptoms. (CX 8).

Claimant’s lumbar symptoms have continued and his August 13, 1998 MRI of the lumbar spine also showed degenerative disc disease at the L3/L4 level (CX 9) and Dr. Sculco ordered a repeat EMG on November 11, 1998, as well as a myelogram if the symptoms do not subside. (CX 10) Those diagnostic tests showed “(a)dvanced diagnostic tests L5-S1 degenerative disc disease,” “mild L3 - L4 and L4-L5 degenerative disc disease,” as well as “advanced L5-S1 degenerative disc and joint disease.” (CX 11) Claimant’s 12/10/09 EMG studies showed a “left L4 root lesion unchanged from studies done Oct 8, 1997". (CX 12).

On December 16, 1998 Dr. Sculco prescribed pain medication and a "rigorous course of physical therapy designed to strengthen the patient's spine and to eliminate the feeling of weakness that persists in his low back area," the doctor remarking the patient is not ready or capable of a work hardening program but a simple physical therapy course to begin with and then "maybe followed by work hardening provided the patient does well." (CX 13).

The Employer referred Claimant for an examination by Dr. Joel Abramovitz, a neurosurgeon, and the doctor, after the usual social and employment history, his review of diagnostic tests and the physical examination, concluded as follows in his July 21, 1998 report (RX 19 at 5-6):

Mr. Morrison has undergone two operations for herniated lumbar disc. He continues to have radiculopathy of uncertain origin. Further evaluations are planned.

I believe Mr. Morrison is currently disabled due to this injury. He has no other cause of disability.

I believe he is capable of performing work that does not involve any lifting, that can be performed primarily in a sitting position and where changes of position are permissible. I am not able to specify how many hours per day he can work.

I do not think he has reached a point of maximum medical improvement. If a new treatable condition cannot be discovered, he will probably reach maximal improvement within the next six months. Pursuant to the edition of the **AMA Guidelines**, I believe he has a thirteen percent permanent impairment. This is apportioned as follows: ten percent of lumbar disc disease status post operation, one percent for the involvement of a second level, and two percent for a second operation involving one of the two levels. You will note that I have not described this percentage as a permanent "functional loss of use" as was requested in the National Employers Company letter. The **AMA Guidelines** make no reference to loss of functional use and carry no implications as to function or to disability.

I am unaware of any previous injuries or conditions that Mr. Morrison might have, other than those related in the history above. The most recent surgical intervention has not been successful. Mr. Morrison is not currently improving and therefore a timed return to his work cannot be predicted. He would have to improve a great deal before he could return to his previous job.

It is quite possible that he is a vocational retraining candidate as he appears to be intelligent and motivated. I have no professional expertise that would allow me to make suggestions concerning what might be appropriate retraining.

In the absence of discovery of a treatable condition causing his current problems, his long term prognosis is uncertain but is more likely for stability than improvement.

Mr. Morrison has not worked in any capacity since his injury. His tolerance for physical activity has been stated above, according to the doctor.

The Employer also referred Claimant for a second opinion by Dr. Philo F. Willetts, Jr., an orthopedic surgeon, and the doctor, after the usual social and employment history, his review of Claimant's diagnostic test and all of his medical records and the physical examination, concludes as follows in his January 18, 1994 report to the Employer (CX 14):

DIAGNOSIS:

1. Previous status post L5-S1 disc excision, with significant improvement.

2. Status post lumbar sprain with subsequent L4-5 and L5-S1 disc excision and removal of scar tissue - with complaints and symptoms of low back and left lower extremity pain, and abnormal left heel reflex.

3. Fifteen years status post arthrosporic knee cartilage removal- non-work related.

Dr. Willetts further opined that Claimant was not totally disabled but could perform selected work within certain restrictions, that his injuries had resulted in a thirteen (13%) percent permanent partial impairment of the whole person, with six (6%) percent thereof due to his pre-existing lumbar problems, that his current disability is not due solely to the June 16, 1997 shipyard accident and that he reached maximum medical improvement on June 16, 1998.

Claimant leads a mostly sedentary life as any exertion aggravates his chronic low back pain on the left side radiating into his thigh and down his left leg. Both legs are numb and tingling, and sometimes feel as though they are asleep. He has to use a cane to ambulate and for stability because of his left-sided weakness. Prolonged standing, sitting or walking also aggravates his symptoms. He is unable to do any work at this time and cannot engage in any of his prior hobbies. (TR 19-24)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the

claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**,his chronic low back pain syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term injury means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury **See** 33 U.S.C. § 902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.** 627 F.2d 455 (D.C. Cir. 1980. A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardener v Bath Oron Works Corporation**, 11 BRBS 556 (1979), **aff'd** sub nom. **Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sub Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) Decision and Order on Remand); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 148 (1989) Moreover, the

employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc.** Lira, 700 D.2d 1046 (5th Cir. 1983); **Mijangos, supra Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work-and-non work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1090); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant injured his low back on June 16, 1997 in a shipyard accident, that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and paid appropriate compensation benefits while he had been unable to return to work, that such injury resulted in a herniated disc, that Claimant underwent surgery on January 20, 1998 as reasonable medical treatment and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D. Md. 1967), **aff'd** 396 D.2d 783 (4th Cir.1968), **cert. denied**, 393 U.S. 962 (1968. Thus the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.** 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C.Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.**)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Handover Bridge Marina**, 17 BRBS 176 (1885); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once

claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**. 538 D.2d 933 (2nd Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F. 2nd 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation** 22, BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as an outside machinist. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2nd Cir. 1976). **Southern V. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 119 (1981). **See also Bumble Bee Seafoods v,. Director, OCWP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2nd Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F. 2d. 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 15, 157 (1989); **Trask V. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.,** 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2nd Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Carae v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988) **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Waylard v. Moore Dry Dock**, 21

BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O Personnel Support Department**, 10 BRBS 670)179). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (lst Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimants credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock** , 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F. 2nd 649 (5th Cir.1968). Moreover, the burden of proof in a temporary total case is the same as in permanent total case. **Bell, supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1076). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flores Company**, 8 BRBS 433 (1978); and an award of permanent disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp., supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 12 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding and Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition had stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 4446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on June 15, 1998 and that he has been permanently and totally disabled from June 16, 1998, according to the well-reasoned opinion of Dr. Willetts. (CX 14).

Medical Expenses

An employer found liable for the payment of compensation is pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, BRBS 300 (1984) Entitlement to medical services is never time-barred where a Disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1984); **Dean Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." **Grant v. Portland Stevedoring Company**, 16

BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents have accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not

necessarily the employer's actual knowledge of it: **Dillingham Corp. v, Massey**, 505 F.2d 1126, (9th Cir. 1974), Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), aff'd 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 8 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the conditions. **Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berstresser, supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable " from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone, supra**.

The pre-existing permanent partial disability need not be economially disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558, F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedore v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **See Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d. Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (lst Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp., Bergeron, supra**.

On the basis of the totality of this closed record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant began to work at the Employer's shipyard on January 3, 1980, (2) that his first back and shoulder injury occurred on November 5, 1990 while working in the North yard at the shipyard (RX 11), (3) that he was out of work from November

16, 1990 through November 20, 1990 (RX 12), (4) that such injury resulted in a seven (7%) percent impairment of the left shoulder, an award which the Employer paid on May 15, 1993 (RX 12), (5) that he reinjured his back on April 18, 1991 while working on the 739 Boat (RX 5), (6) that the Employer accepted the injury as compensable (RX 6), (7) that he was out of work from April 19, 1991 through September 29, 1992 and again from November 3, 1992 through November 8, 1992 because of the effects of his injury (RX 8), (9) that Claimant underwent his first back surgery thereafter, (10) that the Claimant was retained in employment by the Employer with actual knowledge of Claimant's lumbar problems, (11) that the Employer provided suitable light duty work for Claimant upon his return to work (RX 14), (12) that he was also out of work from May 4, 1993 through May 9, 1993 because of that April 18, 1991 injury (RX 9), as well as on July 7, 1993 and July 8, 1993 because of that injury (RX 10), (13) that the Employer retained Claimant in employment, (14) that Claimant his low back on June 16, 1997 in a relatively minor shipyard accident (RX 1), (15) that such injury increased Claimant's low back problems and such worsening can be seen on Claimant's diagnostic tests performed prior to and after his injuries on April 18, 1991 and June 16, 1997, (16) that he has sustained previous work-related industrial accidents prior to June 16, 1997, (17) while working at the Employers shipyard and (18) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e**., his above-enumerated medical problems)in combination with the subsequent work injury, according to Dr. Willetts (RX 15, RX 21). **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, BRBS 79 (3d Cir. 1976); **Dugan V. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his final accident on June 16, 1997, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C&P Telephone Company v. Director, OWCP**, 564 2d 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); Hallford v. Ingalls Shipbuilding, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dock Co**, 15 BRBS 418 (1983), **rev'd on other grounds** sub nom. **Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.** 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 737 (1091).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer, as a self-insurer submitted a fee application on December 17, 1999 (CX 19), concerning services rendered and costs incurred in representing Claimant between April 1, 1999 and December 15, 1999. Attorney Carolyn P. Kelly seeks a fee of $3,877.67 (including expenses) based on 18.25 hours of attorney time and 6.75 hours of paralegal time at various hourly rates.

The Employer has filed a response to the requested attorney's fee and has interposed no objections thereto. (RX 23)

In accordance with established practice, I will consider only those services rendered and costs incurred after March 31, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by his attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $3,877.67 (including expenses of $130.17) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from June 17, 1997 through June 15, 1998, based upon an average weekly wage of $1,009.36, such compensation to be computed in accordance with accordance with Section 8(b) of the Act.

2. Commencing on June 16, 1998, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $1,009.36, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his June 16, 1997 injury.

5. Interest shall be paid by the Employer on all accrued benefit at the T-bill rate applicable under 28 U.S.C.§ 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

7. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $3,877.67 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between April 1, 1999 and December 15, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:las